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In the Matter of)

REQUEST OF A. C. NIELSEN COMPANY)
FOR PERMISSIVE AUTHORITY TO USE)
LINE 22 OF THE ACTIVE PORTION OF)
THE TELEVISION BROADCAST VIDEO)
SIGNAL FOR TRANSMITTING ENCODED)
ADVERTISING AND/OR PROGRAM)
IDENTIFICATION INFORMATION.)

File No. DA 89-1060

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To: The Commission

COMMENTS OF VIDCODE INCORPORATED IN
RESPONSE TO COMMISSION PUBLIC NOTICE

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FEDERAL COMMUNICATIONS
COMMISSION
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COMMENTS OF VIDCODE INCORPORATED
IN RESPONSE TO COMMISSION PUBLIC NOTICE

This memorandum is submitted by VidCode Incorporated ("VidCode") in response to the Commission's Public Notice, DA 89-1060, issued on September 1, 1989. That Notice sought public comments relating to the request of A. C. Nielsen Company ("Nielsen") filed with the Commission July 19, 1989. Nielsen has also filed a related request for Special Temporary Authority ("STA") dated August 14, 1989. In particular, Nielsen sought through these filings to obtain from the Commission permissive authority to use Line 22 of the active video signal to broadcast transmission identification and verification signals as part of its Automated Measurement of Lineups ("AMOL") system.

For the reasons stated below, VidCode submits that Nielsen's request should be denied.

INTRODUCTION.

A. VidCode and the Vidcode System

1. VidCode is a small, emerging high-technology company operating as a provider of commercial broadcast verification services. VidCode has been granted authority to encode information on Line 22 of the active video signal in order to provide these services.¹

1. VidCode's authority was granted on October 27, 1988. (Attachment 1). Airtrax has also been granted authority for this purpose on November 6, 1986.

2. This authority to utilize Line 22 is essential to VidCode's business. Using innovative technology, VidCode can provide advertisers with expanded ability to verify whether, how well, and for how long their commercials are actually being broadcast. In reliance on the grant of this authority, VidCode has invested to date significant amounts in this technology and has already installed monitoring systems and initiated customer services in New York, Chicago and Los Angeles. In accordance with current plans, VidCode will have monitoring installations in 50 cities by December 1990.

3. In establishing this monitoring system, VidCode has developed innovative technologies which apply in particular to Line 22 of the active video signal. Line 22 was selected by VidCode as the medium for its encoding service in conformity with the Commission's decision in the Telescan proceeding and because it was free of interference by other encoding practices, including those of Nielsen.² Operation of VidCode's innovative technology on any available medium other than Line 22 might not be feasible, and in any event would result in substantial additional developmental and marketing costs and delays.

2. As discussed in Airtrax's Opposition, dated August 8, 1989, at page 6 and note 5, VidCode's predecessor originally sought authority to operate on Line 20, but was forced to move to Line 22 due to network objections. These objections apparently were in part the result of Nielsen's presence on Line 20.

B. The Nielsen "AMOL" System.

4. Nielsen is the long-standing industry leader in providing ratings and verifications for national television network programming. As is more fully described in Airtrax's Opposition dated August 8, 1989, at pages 2-5, Nielsen has been authorized to use Line 20 of the Vertical Blanking Interval ("VBI") for its AMOL service, and that service has been in commercial operation since at least 1982. Until February 1988, AMOL was designed primarily to provide verification of national television network program "clearances" by individual network-affiliated television stations, i.e., confirmation that a particular affiliate station broadcast its network's regular daily network "feeds" on a particular date and at particular times. Throughout this period, AMOL has been provided on Line 20.

5. The information encoded by Nielsen is "readable" by special AMOL decoders installed in markets where the network's feed is expected to be broadcast by a station affiliated with that network, and identifies the network feed by its source, date, hour, minute, and second of the feed. This information is injected into Line 20 of the VBI associated with the network feed programming, without regard to the particular program material that is being fed by the network. The AMOL decoder in each affiliate's market "watches" the affiliate's signal and reads the times at which the coded information in the VBI appears and

disappears. Through this process, Nielsen can verify at what times during each day each such affiliate station was transmitting network feeds to its audience, and thereby enable the network to ascertain the extent to which each affiliate cleared the network's feed.

6. Beginning in February, 1988, Nielsen expanded the scope of its traditional AMOL system to provide electronic program verification for syndicated television programming. This additional AMOL service for verification of syndicated programs operates by encoding AMOL onto Line 20 of the VBI for the entire length of the program at the time that a syndicated program is assembled and integrated into a single, continuous tape. This encoded information includes a Source Identification ("SID") Code and a Date/Time "Stamp," which enable the AMOL decoders installed in individual television markets to identify the program by its series title and by the individual episode of each program series. When such a program is broadcast on a local-origination basis by a network-affiliated station to which an AMOL decoder is tuned, Nielsen can verify that the program in question was transmitted by reference to episode number, date, and time. The same situation usually obtains in the case of a non-network-affiliated (i.e., "independent") station.

C. Nielsen's Commercial Verification Services.

7. Although barely alluded to in Nielsen's filings in this proceeding, Nielsen also offers customers a commercial verification service which competes with VidCode and Airtrax.³ This system, known as "Monitor Plus," uses a less flexible and reliable technology than VidCode or Airtrax. Nonetheless, the services are in general competition.

D. If Nielsen Is Allowed to Operate on Line 22, VidCode and Airtrax Could Not Operate.

8. The grant of Nielsen's request to move AMOL is inconsistent with and undermines the Commission's prior grant of authority to VidCode and Airtrax.

9. Line 22 of the active video signal does not have the capacity to accommodate both the commercial advertisement verification codes inserted by companies such as VidCode and Airtrax and the AMOL codes inserted into programming. Because the commercial advertisement verification codes are inserted at an earlier point in the distribution transmission sequence than the AMOL codes, the latter would obliterate the former at least in some instances.

3. Nielsen has claimed that it is not in competition with Airtrax and VidCode, See Nielsen's Opposition to Request (Aug. 21, 1989), at n.16. Nielsen makes this claim of non-competition despite its assertion elsewhere that included within the scope of its request for permissive authority is the authority to transmit "encoded advertising and/or program identification signals." Letter of July 19, 1989 to Alex D. Felker.

10. Nielsen has not provided any basis to conclude that such obliteration would not in fact occur or that it could be effectively precluded or overcome. Simply stated, Nielsen has failed to demonstrate that AMOL could operate on Line 22 without supervening or interfering with VidCode's operations.

DISCUSSION.

11. As demonstrated in greater detail in Airtrax's Opposition filed August 8, 1989, Nielsen has failed to demonstrate that its proposed use of Line 22 comports with Commission policy. In particular, Nielsen has failed to show:

- (A) that it is infeasible to transmit AMOL signals by means other than Line 22; indeed, Nielsen has apparently conceded that this would be feasible (See, Airtrax letter to Chairman Sikes dated September 12, 1989);
- (B) that AMOL signals are an integral part of associated program material; and
- (C) that its intended use of Line 22 complies with the Commission's conditions for permissive authority to use Line 22.

12. In addition, the grant of Nielsen's request would undermine competition in the developing market for commercial verification services by providing Nielsen with

unrestricted ability to drive its competitors -- in particular, VidCode and Airtrax -- out of business.

13. It is rudimentary that, in accordance with statutory mandate, the Commission acts where possible to promote competition, since in general competition promotes the public interest. See, e.g., 47 U.S.C. § 303; Notice of Inquiry and Proposed Rulemaking, "Regulatory Policies and International Telecommunications," 52 Fed. Reg. 5318 (February 20, 1987) (FCC regulatory objectives include open competitive entry, non-discrimination, and technological innovation). This is particularly the case where new, innovative technology offers the possibility of expanded and more efficient services in competition with existing, entrenched service providers. See, e.g., 47 U.S.C. § 1557; Notice of Inquiry, supra.

14. The VidCode technology offers new innovative competition for Nielsen's "Monitor Plus" service. But just as VidCode is about to begin significant competition, Nielsen has requested permission to interfere with VidCode's service. This effort by a predominating company such as Nielsen to obtain the ability to exclude or interfere with a fledgling competitor should not and cannot be condoned.

15. To succeed as a provider of commercial verification services, VidCode must be able to assure its customers that its technology is capable of providing accurate, reliable information. If Nielsen is allowed to

use Line 22 to encode AMOL over commercial breaks, however, VidCode's encoding will be obliterated and rendered totally useless. Even if Nielsen's AMOL encoding intrudes only slightly into the commercial break, VidCode's accuracy and reliability will be undermined.⁴ Thus, Nielsen has, in effect, requested that this Commission provide it with authority to undermine the ability of its competitors to compete with it.

16. The Commission will not be in a position to determine, in advance, whether Nielsen's AMOL encoding is intruding on VidCode's signal. And the damage to VidCode's business will not be subject to retrospective relief, since the reputation of VidCode as a totally reliable, accurate commercial verification service will be irreparably damaged simultaneously with every intrusion by Nielsen.

17. The threat of such damage is of particular significance since VidCode is a start-up company which is in the early stages of supplying its services to customers in the three markets it now serves. Therefore, if Nielsen is given authorization to use Line 22, VidCode will be forced to vacate its present method of operation. This would place an intolerable burden on VidCode to seek out some alternative method of operation, causing substantial damages

4. As Airtrax has demonstrated in its September 12 letter to Chairman Sikes, the likelihood of encroachment is very high given Nielsen's proposed method of operation.

in terms of delay, market credibility and additional development costs, any of which might well result in VidCode's demise.

18. Nielsen's filing provides no countervailing basis to conclude that the public interest, convenience or necessity will be served by placing the commercial viability of VidCode in the hands of Nielsen's encoders. At most, Nielsen argues that granting its request will serve Nielsen's convenience and allow it to avoid the costs associated with providing its expanded AMOL service for syndication. This cannot justify destruction of Nielsen's competitors.

19. Nielsen has apparently admitted that AMOL could operate on Line 23, but has complained that this would cost more than a move to Line 22. VidCode is not aware of the basis for this comparison, but in any event it would be unfair to impose those costs on VidCode. VidCode has reasonably relied upon the Commission's permissive authority, issued in October 1988, in focussing its efforts and investments in technology compatible with operation on Line 22. For VidCode to be forced to move from line 22 in order to accommodate Nielsen's request would mean that VidCode's investment was in substantial part wasted and its ability to compete with Nielsen and Airtrax would be undermined or destroyed. To require Nielsen to develop technology compatible with operation on Line 23 or elsewhere

would place the financial burden of Nielsen's request to expand its AMOL service where it belongs -- on Nielsen -- and would preserve all competitors.

20. In light of the availability to Nielsen of alternatives which will not adversely affect competition, Nielsen's request for permissive authority to operate on Line 22 should be denied.

CONCLUSION

21. For all these reasons, and in particular in light of the anti-competitive effects which would arise from the grant of Nielsen's request, that request should be denied. A fortiori, the request for STA should be denied as well.

Respectfully submitted,

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OCT 26 1988

Attachment 1.

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Mr. Kevin McMahon
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MAIL BRANCH

OCT 26 1988

OCT 27 1988

MAIL BRANCH

signed by
mailed by

Dear Mr. McMahon:

This is in response to your letters of August 23, and September 14, 1988, regarding the general use of the "TeleScan system" to encode advertiser identification signals on line 22 of the television active video signal by television station licensees. Specifically, you request that the Commission confirm that the authorization it granted for use of the "TeleScan system" by TeleScan, Inc., (letter dated July 18, 1985) applies to the provision of such services by VidCode, Inc., as well. You note that VidCode is a new company that is unrelated to TeleScan and will have different ownership. You also state that VidCode expects to acquire the patents and patent applications for the "TeleScan system" from their current owners.

As you know, on May 7, 1985, TeleScan requested that the Commission approve a system to encode advertiser identification signals on line 22 of the television active video signal. The Commission approved TeleScan's request, determining, first, that the transmission of such data qualified as a "special signal," (i.e., a signal that is related to broadcast operation, but not intended for public use), and, second, that the authority granted was "for general use of the TeleScan system on-line 22 by licensees in the television services." The authority granted in the July 18, 1985, letter allows any television licensee to employ a system having the same technical characteristics as the TeleScan system so long as the conditions set forth in that letter are satisfied. The Federal Communications Commission expresses no position with respect to the legality under applicable laws relating to intellectual property rights of the use of the TeleScan system by VidCode or any other party. Moreover, we wish to emphasize that this is a permissive authority only. Television licensees retain ultimate control over their transmissions and are not required to transmit VidCode signals.

Chas?

Sincerely,

Alex D. Felker
Chief, Mass Media Bureau

FB:Blumenthal;jy:pab:prd:M:B
Typed: 10/24/88